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No. 375

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

VIRGIL G. CARROLL, HARRY B. HOGAN, Doing Business as HARRY B. HOGAN PAINTING COMPANY, and ST. PAUL-MERCURY INDEMNITY COMPANY ..... *Petitioners*

v.

M. LANZA, Doing Business as LAKE CHARLES ELECTRIC COMPANY ..... *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court is reported at 116 F. Supp. 491 and appears on pages 40-69 of the printed record. The opinion of the United States Court of Appeals for the Eighth Circuit appears in the appendix to the petition (pp. I-XVI).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

The question presented for review is whether, under the facts and circumstances of this particular case, the law of the State of Missouri which bars an action by the employee of a subcontractor against the general contractor should apply.

STATEMENT

Virgil G. Carroll, one of the petitioners, was injured on January 26, 1953, in an accident that occurred in Baxter County, Arkansas, during the construction of Bull Shoals Dam (R.94). Carroll was an employee of petitioner Harry B. Hogan, doing business as Harry B. Hogan Painting Company (R.92). Petitioner St. Paul-Mercury Indemnity Company was the workmen's compensation insurance carrier for Hogan (R.93). Hogan was a subcontractor on this job under respondent M. Lanza, doing business as Lake Charles Electric Company, who was the general contractor (R.92-93). Both Hogan (R.92) and Carroll (R.94) are residents of Springfield, Missouri, and Carroll was employed by Hogan in the State of Missouri (R.94). Lanza is a resident of the State of Louisiana (R.1,5).

On March 2, 1953, Carroll filed suit in the Circuit Court of Baxter County, Arkansas, against Lanza, alleging a common law action for damages as a result of the occurrence of January 26, 1953 (R.5-7). Harold J. Fisher of Springfield, Missouri, was attorney for Carroll on March 2, 1953 (R.7) and has continued as counsel for Car-

roll throughout this litigation. The action in Baxter County, Arkansas, was removed by Lanza to the United States District Court for the Western District of Arkansas (R. 1-2). Thereafter, Hogan and St. Paul intervened in the District Court action (R.25).

Trial to the Court without a jury (R.27) resulted in a judgment in favor of petitioners in the sum of Eighteen Thousand Dollars ($18,000.00) (R.70-71). Upon appeal to the United States Court of Appeals for the Eighth Circuit, this judgment was reversed (App. to Petition p. XVI). The Court of Appeals held that the cause of action was controlled by the law of the State of Missouri which bars a common law action by the employee of a subcontractor against a prime contractor where the Missouri Workmen's Compensation Act is applicable.

The facts pertinent to the question of whether or not the Missouri law is controlling are stated below.

Carroll, a resident of Missouri, employed in Missouri by Hogan, who was also a Missouri resident, received 34 weekly workmen's compensation payments under the Missouri Workmen's Compensation Act (R.103). These 34 payments were made through Harold J. Fisher, attorney for Carroll and also attorney for St. Paul. Carroll knew that he was receiving payments under the Missouri Workmen's Compensation Act (R.30). On October 10, 1953, Carroll requested of St. Paul that his workmen's compensation be paid under the Arkansas Workmen's Compensation Act (R.32-33). However, this request was not made until after the importance of the Missouri Workmen's Compensation payments had been called to the attention of counsel for Carroll by a request that they stipulate that Carroll's payments were being made under the Missouri Act (R.126-127). The maximum weekly compensation un-

der the Missouri law is $30.00, and the maximum weekly compensation under the Arkansas law is $25.00 (R.103).

It is well settled under Missouri law that an employee of an insured subcontractor may not maintain an action for common law negligence against a general contractor. *Bunner* v. *Patti*, 343 Mo. 274, 121 S.W. 2d 153, and *New Amsterdam Casualty Company* v. *Boaz-Kiel Construction Company*, 8 Cir., 115 F. 2d 950.

It has been held by the Circuit Court of Appeals for the Eighth Circuit that an employee of an insured subcontractor may sue the prime contractor at common law for negligence under the Arkansas Workmen's Compensation Law. *Anderson* v. *Sanderson & Porter*, 8 Cir., 146 F. 2d 58 (1945). However, this question has never been passed upon by the Arkansas Supreme Court, and there is, therefore, no controlling precedent on the Arkansas law on this point.

ARGUMENT

The question before the Court of Appeals was whether it should apply Missouri law or Arkansas law. The answer to that question depended upon the particular facts and circumstances of this particular case. The Court held that the rights of a Missouri resident employed in Missouri by a Missouri employer, who had for 34 weeks accepted compensation payments under the Missouri Workmen's Compensation Act through the attorney for the Workmen's Compensation Insurance carrier who was also his attorney, were controlled by Missouri law, although the accident itself occurred in the State of Arkansas.

It is, to say the very least, very doubtful that the decision of the Court of Appeals can be accurately described as being founded upon a theory of "election of remedies". The word "elected" in the opinion of the Court of Appeals is placed in quotations (Appendix to Petition p. XIV). It would appear that the Court of Appeals really held that the State of Missouri, in a proper exercise of its sovereign power, had provided that the acceptance of benefits under its workmen's compensation law should carry with it the acceptance of the provision that such benefits constituted an exclusive remedy; and that Carroll could not accept Missouri compensation payments for a period of 34 weeks and then contend that the bar of the Missouri statute had no application.

I

There Is No Conflict of Decision

The contention of petitioners that this decision is in conflict with decisions of other Courts of Appeals and with applicable state law is predicated upon an extremely tenuous base. All of the cases cited by petitioners deal only

with the general principles of law applicable to the question of "election of remedies". None of those cases involve a fact situation even remotely resembling that involved in the present case. Two of the Courts of Appeals decisions cited by petitioners held that an "election" had been made. *A. Klipstein & Company* v. *Grant*, 5 Cir., 141 F. 72, and *Minneapolis National Bank* v. *Liberty National Bank*, 10 Cir., 72 F. 2d 434. Both of the decisions of the United States Supreme Court cited by petitioners held that an election had been made. *Robb* v. *Vos*, 155 U.S. 13, 39 L. Ed. 52, 15 S. Ct. 4; and *United States* v. *Oregon Lumber Company*, 260 U.S. 290, 67 L. Ed. 261, 43 S. Ct. 100. The other three Court of Appeals cases cited by petitioners held that an election had not been made. *Pittsburgh Terminal Coal Corporation* v. *Bennett*, 3 Cir., 73 F. 2d 387; *Flannery Boat Company* v. *Greenslade*, 26 F. Supp. 502; aff. 108 F. 2d 531, cer. den. 309 U.S. 671, 84 L. Ed. 1017, 60 S. Ct. 615; and *Miles* v. *Lavender*, 9 Cir. 10 F. 2d 450. It would be equally as accurate to characterize the former four cases as being in conflict with the latter three as it is to contend that the present case is in conflict with all seven. However, it is obviously more accurate to state that none of the decisions are in conflict, for application of an identical principle of law to two entirely dissimilar fact situations can quite properly produce contrary results.

Certainly, the decision of the Court of Appeals does not announce an adherence to general principles concerning "election of remedies" which is contrary to that announced in the opinions cited by petitioners. Even if petitioners are correct in assuming that this case turns upon an "election", that would not justify the rather violent assumption that the Court was following erroneous, but unannounced, principles of law.

Not only is the present decision not in conflict with decisions of other courts, it is, in fact, in complete harmony with the decisions of other courts which have considered similar questions of law.

A similar question was presented in the case of *Ohlhaver* v. *Narron*, 4 Cir., 195 F. 2d 676 (1952). That action arose out of an automobile accident that occurred in North Carolina. The plaintiff was a passenger in an automobile operated by the defendant's decedent. Plaintiff and decedent were follow-employees of a New York employer, and the contract of employment had been entered into in the State of New York. Both were acting within the scope of their employment at the time of the accident. The plaintiff had been paid compensation under the Workmen's Compensation Act of New York, and that act precluded one, accepting benefits under the act, from bringing an action against a fellow-servant.

The Court held:

> "We think the district judge, having rightly found that plaintiff and Graham were fellow-servants, was further correct in holding that plaintiff, who received benefits under the Workmen's Compensation Act of New York was barred by that Act from bringing an action in a Federal Court in North Carolina against Graham, plaintiff's fellow-employee."

The Court said further:

> "Of the two states whose interests are here concerned (New York and North Carolina), we think New York is more intimately concerned; for it was there that the employer resides, the employment contract was there entered into, and it was from there that the activities of the plaintiff were directed. The employer has secured its workmen's compensation liability by procuring a policy of in-

> surance which contains an endorsement covering injuries sustained in any state. Since its interests are superior, the compensation act of New York is a bar to a common law action by an employee against a fellow-servant in any other jurisdiction."

Also directly in point is the case of *Jonathan Woodner Co.* v. *Mather*, D.C. Cir., 210 F. 2d 868 (1954). That action, like the present case, involved a suit by the employee of a subcontractor against the prime contractor. The plaintiff there was a resident of the District of Columbia and was employed in the District of Columbia. He was injured in Maryland. Under Maryland law an employee of a subcontractor cannot maintain a common law action for negligence against the prime contractor. Both the subcontractor and the prime contractor had workmen's compensation insurance, but the plaintiff did not claim workmen s compensation benefits under either the Maryland statute or the District of Columbia statute. Instead, he filed suit in the District of Columbia against the prime contractor for common law negligence. Upon appeal from a judgment in favor of the plaintiff, the Court of Appeals for the District of Columbia held:

> "* * * * in an employee-employer suit, if some Workmen's Compensation Act purports to bar the action, that bar will be applied in the forum."

The Court accordingly reversed the judgment in favor of plaintiff.

The identical question was involved in *Bradford Electric Company* v. *Clapper*, 1932, 286 U.S. 145, 52 S. Ct. 571, 76 L. Ed. 1026. That case is analyzed in *Jonathan Woodner Co.* v. *Mather, supra*, as follows:

> "Appellant says that under the full faith and credit clause we are bound to apply the law of Maryland. Much support for that contention is to be found in the decision of the Supreme Court in *Brad-*

ford Electric Company v. *Clapper*, 1932, 286 U.S. 145, 52 S. Ct. 571, 76 L. Ed. 1026. A negligence suit was there brought in New Hampshire by an employee against his employer, for an injury occurring in New Hampshire. The defense raised was that the contract of employment was made in Vermont, that the parties resided and did business there, and that under the laws of that state workmen's compensation was provided for the injury in question, and was made the sole remedy. Mr. Justice Brandeis, speaking for the Supreme Court, held that the full faith and credit clause required that the bar to suit raised by Vermont law be applied.

"During the intervening years the authority of the Bradford case has been attacked: Some commentators consider that it has been virtually overruled. But the impact of the later cases in the Supreme Court has been to expand the rights of interested states to provide workmen's compensation: the compensation system has thus been materially strengthened. It is now clear that the state of employment can give workmen's compensation, even though the injury occurred in another jurisdiction which would provide workmen's compensation on a basis said to be exclusive: *Alaska Packers Association* v. *Industrial Accident Commission*, 1935, 294 U.S. 532, 55 S. Ct. 518, 79 L. Ed. 1044. Clearly, too, the state in which the injury occurred can provide workmen's compensation, even though the state where the contract of employment was made would also provide workmen's compensation, on a purportedly exclusive basis: *Pacific Employers Insurance Company* v. *Industrial Accident Commission*, 1939, 306 U.S. 493, 59 S. Ct. 629, 83 L. Ed. 940. *But no decision of the Supreme Court has allowed a suit at common law to be maintained against the employer in a case where workmen's compensation was available to the employee by the law of a state having a substantial interest, and was declared to be the exclusive remedy by that law. In that situation,*

the reasoning of the Bradford case seems as valid today as it ever was" (italics supplied).

Jonathan Woodner Co. v. Mather, supra, also refers to Restatement, Conflict of Law, Section 401 (1948 Supp.) where it is said:

> "If a cause of action in tort or an action for wrongful death either against the employer or against a third person has been abolished by a workmen's compensation act of the place of wrong, no action can be maintained for such tort or wrongful death in any state.
>
> "* * * * *
>
> "b. *Effect of constitution of the United States.* If the compensation act of the state where the contract of employment is made abolishes the common law or statutory right of action either as a result of the fact that the employment was entered into in that state or by reason of the election of the parties to come within the operation of that act, no action can be maintained in any state irrespective of where the workmen was injured or killed unless the state where the wrong occurred has declared the act obnoxious to its policy of permitting recovery for the protection of the interests of persons living in the state. This result is required as between states of the United States under the full faith and credit clause of the constitution."

As has been previously stated, the Supreme Court of Arkansas has never passed upon the question of whether or not its own compensation law would bar the present action, therefore, it is impossible to contend that the State of Arkansas has announced that such a policy is obnoxious to it.

Petitioner has not called to the attention of this Court any decisions or statements of the law to the contrary.

II

The Court Correctly Interpreted the Import of the Case of Magnolia Petroleum Company v. Hunt

The case of *Magnolia Petroleum Company* v. *Hunt*, 320 U.S. 430, 64 S. Ct. 208, 88 L. Ed. 149, is referred to in the decision of the court below as follows (Appendix to Petition p. XV-XVI):

> "In the *Magnolia* case, Hunt, a resident of Louisiana, was employed in that state by Magnolia as a laborer in connection with the drilling of oil wells. In the course of his employment he went to Texas where, while working on an oil well, he was injured. He procured workmen's compensation for his injuries under the Texas Workmen's Compensation Law. Under the Texas law the award of compensation was final and exclusive, resembling the Missouri law in that respect. Afterward Hunt instituted a proceeding in Louisiana to recover compensation under the laws of that state. He was awarded the relief demanded by the State Court of Louisiana, and the Supreme Court reversed. It is difficult to distinguish that case from the present one. We are disposed, therefore, to apply what appears to us to be its authority here."

Petitioner contends that the *Magnolia Petroleum Company* case is not in point because Carroll never obtained an award of compensation from the Missouri Commission and never even filed his claim with that commission. The Court of Appeals, however, was undoubtedly aware that it is customary in Missouri, in uncontested compensation cases, for the Act to be implemented by the payment and receipt of compensation, without any requirement that there be a formal claim or formal award. Missouri law contemplates that the provisions of the act shall be carried out in that manner, and awards of compensation by the Missouri Commission occur only in contested cases.

Therefore, unless form is to be preferred over substance, the payment and acceptance of benefits under the Missouri Act has the same effect as a formal award under the Texas Act.

Actually, it is apparent that the Arkansas Workmen's Compensation Commission had no jurisdiction to accept a "transfer" of Carroll's compensation claim from Missouri. But, since the "opposing parties" before the Arkansas Workmen's Compensation Commission are the joint petitioners here, it is not surprising that the jurisdictional question has never been raised.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted

EDWARD L. WRIGHT
Counsel for Respondent

October 20, 1954